CLERK'S COPY.

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1916

No. 53

GREAT NORTHERN RAILWAY COMPANY,
PETITIONER,

vs.

SUNBURST OIL & REFINING COMPANY

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MONTANA

FILED JUNE 6, 1916

(36,727)

( )

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[fol. 1]

IN DISTRICT COURT OF EIGHTH JUDICIAL DISTRICT OF MONTANA IN AND FOR THE COUNTY OF CASCADE

SUNBURST OIL & REFINING COMPANY, a Corporation,
Plaintiff,

vs.

GREAT NORTHERN RAILWAY COMPANY, a Corporation,
Defendant

COMPLAINT—Filed April 1, 1930

Comes now the above named plaintiff and for its cause of action against the defendant herein, complains and alleges:

I

That during all the times herein mentioned plaintiff has been and now is a corporation organized and existing under [fol. 2] and by virtue of the laws of the State of Montana, with its principal place of business at Great Falls, Cascade County, Montana.

II

That the Great Northern Railway Company during all the times herein mentioned was and still is a corporation duly organized and existing under and by virtue of the laws of the State of Minnesota, and doing business in the State of Montana, as a common carrier of freight. That in and for the conduct of its business as such common carrier said defendant owns, maintains, operates, and controls lines of railroad connecting the towns of Kevin and Sunburst, Montana, with the City of Great Falls, Montana.

III

That in connection with its business as a common carrier of freight said defendant promulgated on the 26th day of

January, 1926, effective January 30, 1926, a freight rate on carload shipments of crude petroleum distillate over its said lines from said towns of Kevin and Sunburst, Montana, to the city of Great Falls, Montana, of twenty and one-half (20½¢) cents per hundred weight and that said rate was duly approved by the Railroad Commission of the State of Montana by its order Number 339.

IV

That between the 28th day of August, 1926 and the 4th day of August, 1928, plaintiff caused to be shipped over the lines of said defendant from the towns of Kevin and Sunburst, Montana, to the city of Great Falls, Montana, 266 carloads of crude petroleum distillate. That said shipments were made under the rate established as aforesaid.

[fol. 3]

V

That for the transportation of said crude petroleum distillate, defendant required plaintiff to pay the sum of twenty and one-half (20½¢) cents per hundred pounds; that plaintiff had no means of weighing said crude petroleum distillate at the time it delivered same to defendant; that defendant was possessed of and had available in course of transportation of said crude petroleum distillate, means for ascertaining the exact weight thereof, but failed and neglected to weigh the cars in which said crude petroleum distillate was loaded to ascertain the weight of the quantities of crude petroleum distillate in each of said cars, as was its duty so to do; that defendant estimated the weight of said crude petroleum distillate at 7.4 pounds per gallon and required plaintiff to pay for the transportation thereof upon such basis, but the actual weight of said crude petroleum distillate was 6.6 pounds per gallon; that the total quantities of said crude petroleum distillate so transported by defendant for plaintiff, weighed not to exceed 17,085,342 pounds, for which said defendant was entitled to receive from the defendant for transportation charges the sum of $35,066.33, but defendant estimated the weight of the contents of said cars as 19,182,237 pounds, and compelled defendant to pay to plaintiff for the transportation thereof the sum of $39,310.01.

VI

That plaintiff on or about the 15th day of August, 1929, discovered that the defendant had erroneously determined or estimated the weight of said crude petroleum distillate transported in said cars and that thereby overcharged said plaintiff for the transportation of said cars in the amount [fol. 4] of $4,243.70, which said sum defendant had received from plaintiff for said defendant's use and benefit and without any right thereto.

VII

That on or about the 15th day of August, 1928, plaintiff demanded of defendant payment to plaintiff of said sum of $4,243.70, but defendant refused and still refuses to pay the same or any part thereof to the plaintiff, and has at all times since unjustly and unlawfully withheld and still withholds said money from the plaintiff.

Wherefore plaintiff demands judgment against said defendant for the sum of $4,243.70, with interest thereon at the rate of eight per cent per annum from the 15th day of August, 1928, and for plaintiff's costs and disbursements incurred in and by reason of this action.

Homer G. Murphy, Hurd, Hall & McCabe, Attorneys for Plaintiff.

(Duly verified.)

[File endorsement omitted.]

In District Court of Cascade County

Answer—Filed April 19, 1930

Comes now the defendant in the above-entitled action and for its answer to the complaint herein:

I

Admits the allegations contained in paragraphs I, II, and IV thereof.

[fol. 5]

II

Admits that on January 26, 1926, the defendant promulgated a tariff, effective January 30, 1926, naming a freight rate of twenty and one-half cents (20½¢) per hundred weight on carload shipments of crude petroleum distillate over its said lines from the towns of Kevin and Sunburst, Mont., to the city of Great Falls, Mont., said tariff being known as G. N. Ry. G. F. O. No. 2073-F and being approved by the Board of Railroad Commissioners of the State of Montana by its order No. 1642.

III

Admits that for the transportation of the crude petroleum distillate referred to in paragraph IV of said complaint the defendant required plaintiff to pay the sum of twenty and one-half cents (20½¢) per hundred pounds, and that defendant estimated the weight of said crude petroleum distillate at seven and four-tenths (7.4) pounds per gallon and required plaintiff to pay for the transportation thereof upon such basis.

IV

Further answering, defendant alleges that said tariff G. N. Ry. G. F. O. No. 2073-F, contained the following provision:

"Minimum and Estimated Weight.—Rates on Petroleum Oils as described herein are subject to Estimated Weight of 7.4 pounds per gallon, also Rules, Minimum Weights and Outage Allowances as provided in connection with Petroleum Crude Oil in Western Classification No. 59, Mont. R. C.-W. C. No. 2 (issued by R. C. Fyfe, Agent), G. N. Ry. G. F. O. No. 800-F, supplements thereto and successive issues thereof."

V

Further answering, defendant alleges that said tariff G. N. Ry. G. F. O. No. 2073-F was the only lawful tariff naming rates on crude petroleum distillate from Kevin and Sun-
[fol. 6] burst, Mont., to Great Falls, Mont., during the period between August 28, 1926, and August 4, 1928.

VI

Further answering, defendant alleges that the charges exacted from plaintiff for the transportation of said 266

carloads of crude petroleum distillate from Kevin and Sunburst, Mont., to Great Falls, Mont., were computed in accordance with the provisions stated in said tariff G. N. Ry. G. F. O. No. 2073-F.

VII

Except as hereinbefore admitted each and every allegation in said complaint contained is hereby specifically denied.

Wherefore defendant prays that plaintiff take nothing in this action and that defendant have its costs and disbursements.

R. J. Hagman, J. P. Plunkett, 1120 Great Northern Bldg., St. Paul, Minn.; W. L. Clift, Great Falls, Mont., Attorneys for Defendant.

(Duly verified)

[File endorsement omitted.]

In District Court of Cascade County

Reply—Filed April 24, 1930

Comes now the plaintiff above named and for its reply to the answer of defendant on file herein admits, denies and alleges as follows:

I

Replying to paragraph IV of said answer, plaintiff admits the allegations thereof.

[fol. 7]

II

Replying to paragraph V of said answer, plaintiff admits that said tariff G. N. Ry. G. F. O. No. 2073-F was the only tariff naming rates on crude petroleum distillate from Kevin and Sunburst, Montana, to Great Falls, Montana, during the period between August 28th, 1926, and August 4th, 1928. Denies that said tariff so far as it based its rate on the estimated weight and not the actual weight of crude petroleum distillate was lawful or authorized by law.

III

Replying to paragraph VI of said answer, plaintiff denies each and every matter, fact and thing alleged and contained therein.

Wherefore, having fully replied to the answer of defendant on file herein, plaintiff prays judgment as in its complaint set forth.

Hurd, Hall & McCabe, Homer G. Murphy, Attorneys for Plaintiff.

(Duly verified.)

[File endorsement omitted.]

In District Court of Cascade County

Agreed Statement of Facts—Filed June 21, 1930

Come now the parties above named and stipulate and agree that the facts in the above entitled cause are as here-
[fol. 8] inafter set forth, and submit said cause to the Court for its decision thereon:

I

That during all the times herein mentioned, plaintiff has been and now is a corporation organized and existing under and by virtue of the laws of the State of Montana, with its principal place of business at Great Falls, Cascade County, Montana.

II

That during all the times herein mentioned, defendant was and still is a corporation duly organized and existing under and by virtue of the laws of the State of Minnesota, and doing business in Montana, as a common carrier of freight. That in and for the conduct of its business as such common carrier said defendant owns, maintains, operates and controls lines of railroad connecting the towns of Kevin and Sunburst, Montana, with the city of Great Falls, Montana.

III

That in connection with its business as a common carrier of freight said defendant promulgated on the 25th day of January, 1926 effective January 30th, 1926 a freight rate on carload shipments of crude petroleum distillate over its said lines from said towns of Kevin and Sunburst, Montana, to the city of Great Falls, Montana, at twenty and one-half cents per hundredweight, said tariff being known as G. N. Ry. G. F. O. No. 2073-F and being approved by the Board of Railroad Commissioners of the State of Montana by its order No. 1642.

IV

That said Tariff G. N. Ry. G. F. O. No. 2073-F, contained the following provision:

[fol. 9] "Minimum and Estimated Weights.—Rates on Petroleum Oils as described herein are subject to Estimated Weight of 7.4 pounds per gallon, also Rules, Minimum weights and Outage Allowances as provided in connection with Petroleum Crude Oil in Western Classification No. 59, Mont. R. C.—W. C. No. 2 (issued by R. C. Fyfe, Agent) G. N. Ry. G. F. O. No. 800-F, supplements thereto and successive issues thereof."

V

That said tariff G. N. Ry. G. F. O. No. 2073-F was the only tariff naming rates on crude petroleum distillate from Kevin and Sunburst, Montana, to Great Falls, Montana during the period between August 28th, 1926 and August 4th, 1928.

VI

That between the 28th day of August, 1926 and the 4th day of August, 1928, plaintiff caused to be shipped over the lines of said defendant from the towns of Kevin and Sunburst, Montana to the city of Great Falls, Montana 266 carloads of crude petroleum distillate. That said shipments were made under the rate and tariff aforesaid.

VII

That for the transportation of said crude petroleum distillate, defendant required plaintiff to pay the sum of

twenty and one-half cents per hundred pounds, that plaintiff had no means of weighing said crude petroleum distillate at the time it delivered same to defendant or otherwise, that defendant was possessed of and had available in course of transportation of said crude petroleum distillate, means for ascertaining the exact weight thereof, but did not do so, but estimated the weight of said crude petroleum [fol. 10] distillate at 7.4 pounds per gallon and required plaintiff to pay for the transportation thereof upon such basis, but the actual weight of said crude petroleum distillate was 6.6 pounds per gallon, that the actual weight of said crude petroleum distillate so transported by defendant for plaintiff, was not to exceed 17,085,342 pounds, but that defendant estimated the weight thereof at 19,182,237 pounds and required plaintiff to pay for the transportation thereof the sum of $39,310.01.

VIII

That on or about the 15th day of August, 1928, plaintiff demanded of defendant payment to plaintiff of the sum of $4,243.70, representing the difference between the rate calculated upon the actual weight of said crude petroleum distillate and the amount required to be paid by defendant calculated on the estimated weight thereof as aforesaid, but defendant refused and still refuses to pay said sum or any part thereof to plaintiff.

Dated this 3rd day of June, 1930.

Homer G. Murphy, Hurd, Hall & McCabe, Attorneys for Plaintiff. R. J. Hagman, J. P. Plunkett, W. L. Clift, Attorneys for Defendant.

[File endorsement omitted.]

[fol. 11] In District Court of Cascade County

Additional Stipulation of Facts—Filed July 25, 1930

Come now the parties above named and stipulate and agree that the following facts, in addition to those heretofore stipulated in this action, shall be considered by the

Court in its determination of the above action and that said facts hereinafter set forth shall be a part and portion of the facts heretofore agreed upon and stipulated, as paragraphs V-A, VII-A and IX thereof.

Dated this 10th day of July, 1930.

Homer G. Murphy, Hurd, Hall & McCabe, Attorneys for Plaintiff. W. L. Clift, R. J. Hagman, J. P. Plunkett, Attorneys for Defendant.

V-A

With the approval of the Board of Railroad Commissioners (Mont. R. C. A. No. 321) a rate of 25 cents was published from Kevin and Sunburst to Kalispell, Mont., effective May 9, 1925, the tariff being known as G. N. G. F. O. No. 2303-B. This tariff carried the proviso that the rates on petroleum oils described therein were subject to an estimated weight of 7.4 pounds per gallon. On August 19, 1925, defendant filed with the Board of Railroad Commissioners its written application for authority to publish a rate of 20½ cents on crude petroleum distillate from Kevin and Sunburst to Great Falls, with the same minimum and estimated weights, rules and regulations, etc., as were contained in G. N. G. F. O. No. 2303-B (Mont. R. C. A. No. 321). Authority for this publication was granted [fol. 12] and on August 26, 1925, the defendant published the 20½-cent rate from Kevin and Sunburst (G. N. G. F. O. No. 2435-A, Mont. R. C. A. No. 326), subject to estimated weight of 7.4 pounds per gallon. This rate was carried forward, subject to the same estimated weight, in G. N. G. F. O. No. 2073-F (Mont. R. C. A. No. 339), issued January 26, 1926, effective January 30, 1926, with Sweet Grass being added as a point of origin.

VII-A

That of said sum of $39,310.01, the sum of $26,068.32 was paid to defendant by plaintiff subsequent to April 2nd, 1927, and that said last mentioned sum so paid represented the freight charges on 12,701,655 pounds of said crude petroleum distillate, based upon an estimated weight of 7.4 pounds per gallon, but that the actual weight of said crude petroleum distillate for which payment was made subse-

quent to April 2nd, 1927, at 6.6 pounds per gallon was 11,349,801 pounds.

IX

That on or about the 19th day of April, 1929, plaintiff herein filed with the Board of Railroad Commissioners of the State of Montana, its complaint alleging that the charges collected by the defendant herein for the transportation of said crude petroleum distillate were unjust and unreasonable to the extent that they exceeded the charges that would have accrued at the rate of twenty and one-half cents per hundred pounds on the basis of a weight of 6.6 pounds per gallon. That after issue was joined between plaintiff and defendant herein in such proceedings a hearing was held at which both plaintiff and defendant herein were represented. That thereafter said Board of Railroad Commissioners of the State of Montana, in said proceeding, duly made, gave and entered its order and findings, a copy of which order is hereto attached, marked ex-[fol. 13] hibit "A" and by this reference made a part hereof.

EXHIBIT "A"

Board of Railroad Commissioners of the State of Montana

Ex Officio

Public Service Commission of Montana, Montana Trade Commission, Montana Irrigation Commission

Certificate

UNITED STATES OF AMERICA,
State of Montana, ss:

I, Francis A. Silver, Secretary of the Board of Railroad Commissioners of the State of Montana and ex-officio Secretary of the ——, do hereby certify that I have compared the annexed copy of Report and Order No. 1551 in Docket No. 1033, Re Sunburst Oil & Refining Company vs. Great Northern Railway Co. with the original thereof filed in the office of said Board of Railroad Commissioners and in my custody, on the 14th day of October, 1929, and that the said

annexed copy is a full, true and correct transcript of said original and of the whole of said original.

In testimony whereof I have hereunto set my hand and affixed the official seal of the Board of Railroad Commissioners of the State of Montana this 9th day of July A. D., One Thousand Nine Hundred and thirty.

Francis A. Silver, Secretary of the Board of Railroad Commissioners of the State of Montana. (Seal of the Board. Ex Officio Secretary of — of Railroad Commissioners.)

[fol. 14] BEFORE THE BOARD OF RAILROAD COMMISSIONERS OF THE STATE OF MONTANA

(Docket No. 1033. Report and Order No. 1551)

(Hearing June 26, 1929. Decided October 14, 1929)

SUNBURST OIL & REFINING CO.

vs.

GREAT NORTHERN RAILWAY CO.

Complaint, alleging estimated weight of crude petroleum distillate unreasonable and transportation charges based thereon excessive. Complaint sustained.

Appearances: M. Homer G. Murphy, Secretary, Sunburst Oil & Refining Company, Great Falls, Montana; Mr. W. D. O'Brien, A. G. F. A., and Mr. J. P. Plunkett, General Attorney, for the Great Northern Railway Company, St. Paul, Minnesota; Francis A. Silver, Counsel, and H. B. Schaefer, Traffic Expert, for the Board.

Before the Board en Banc, at Helena, Montana

By the BOARD:

By complaint filed April 19, 1929, complainant, Sunburst Oil & Refining Company, a corporation, engaged in the business of refining crude petroleum and crude petroleum distillate and the marketing of the products therefrom, with principal place of business at Great Falls,

Montana, alleges that the charges collected by the defendant, Great Northern Railway Company, for the transportation of 266 carloads of crude petroleum distillate in tank cars, from Kevin and Sunburst, Montana, to Great Falls, Montana, between August 28, 1926, and August 4, 1928, at the lawful rate and estimated weight of 7.4 pounds per gallon applied to marked gallon capacity of the cars, were unjust and unreasonable to the extent that they exceeded the [fol. 15] charges that would have accrued at the lawful rate applied on the basis of an estimated weight of 6.6 pounds per gallon. A finding responsive to the allegations aforesaid and reparations in the sum of $4,244.67 is requested. The rate charged is not assailed. Rates will be stated in amounts per 100 pounds.

The record discloses that in 1924 the defendant published a rate of 42 cents on crude petroleum distillate (viz: untreated distillate for further refining), in tank cars, carloads, from Kevin and Sunburst, Montana, to Hillyard, Washington, a suburb of Spokane, (G. N. G. F. O. No. 2268-B). The tariff contained the proviso that the charges on crude petroleum distillate would be computed on estimated weight of 7.4 pounds per gallon on the shell capacity of the tank, in gallons. Subsequently, upon request of interested parties, and with the approval of this Board (Mont. R. C. No. 321), a rate of 25 cents was published from Kevin and Sunburst to Kalispell, Montana, effective May 9, 1925, (G. N. G. F. O. No. 2303-B), the tariff carrying the proviso that the rates on petroleum oils described therein was subject to an estimated weight of 7.4 pounds per gallon. On July 25, 1925, the complainant filed a written request with defendant praying for the establishment of "rates in proportion to that published under Mont. R. C. No. 321." On August 11, 1925, a complaint was filed with the Board requesting the establishment of a fair and equitable rate on crude petroleum distillate from Sunburst to Great Falls. After considerable negotiations between complainant and defendant, the defendant agreed to publish a 20½-cent rate on this commodity from Kevin and Sunburst to Great Falls, and on August 19, 1925, it filed its written application with the Board asking authority to publish said rate "within the [fol. 16] same minimum and estimated weights, rules, regulations, etc., as is contained in G. F. O. No. 2303-B, Mont. R. C. 321." This application was amended on August 26,

1925, so as to include Sweet Grass, Montana, as a point of origin. The complaint was forthwith withdrawn "without prejudice to renewing the same later," (18 M. U. R. —, Inf. Docket 1844), and on August 26, 1925, the defendant published the 20½-cent rate from Kevin and Sunburst (G. N. G. F. O. No. 2435-A, Mont. R. C. No. 326), subject to estimated weight of 7.4 pounds per gallon. This rate was carried forward, subject to the same estimated weight, in G. N. G. F. O. No. 1073-F, Mont. R. C. No. 339, issued January 26, 1926, effective January 30, 1926, Sweet Grass being added as a point of origin.

It is conceded by defendant that the 266 carloads of crude petroleum distillate in question was transported between the dates mentioned and that the freight charges were assessed by defendant and paid by complainant on the basis of 7.4 pounds per gallon and at the rate of 20½ cents in accordance with said last mentioned tariff.

It is likewise conceded that on February 7, 1928, the complainant applied to the defendant for an amendment to tariff No. 2073-F, supra, to provice for and estimated weight of 6.6 pounds per gallon on crude petroleum distillate; that subsequent thereto and during the early summer of 1928, the Western Weighing and Inspection Bureau, at the request of the defendant, made a test covering ten cars which moved from the Kevin-Sunburst field to complainant's refinery at Great Falls; that thereafter and on July 13, 1928, the defendant advised the complainant that it had decided to grant complainant's request for reduction of estimated weight and did publish on July 31, 1928, effective August 4, 1928, its tariff No. 2073-G, Mont. R. C. No. 379, [fol. 17] providing an estimated weight of 6.6 pounds per gallon. In the defendant's application to the Board for authorization for reduction of estimated weight, the carrier represented as the reason and basis for the change that:

"Complaint has been made by an interested shipper, the Sunburst Oil & Refining Company, that the weight on Crude Petroleum Distillate does not exceed in any case 6.563 pounds per gallon as determined by actual laboratory scale weight. This has been substantiated in report by the Western Weighing and Inspection Bureau as result of test made by them on a number of cars."

and requested publication on short notice:

"In order that shippers may have the benefit of the more accurate estimated weights at the earliest possible date."

The reduction of estimated weight was made applicable to all shipments of crude petroleum distillate from the following origin points, to-wit: Sweet Grass, Sunburst, Kevin, Shelby and Great Falls, to the following destination points: Havre, Kalispell, Great Falls, Lewistown and Butte. Thus, all movements of this commodity over the defendant's line in Montana, were made subject to an estimated weight of 6.6 pounds per gallon.

The superintendent of the complainant's refinery, whose qualifications are conceded, testified at the hearing herein that each of the 266 carloads of crude petroleum distillate was tested upon its arrival at the refinery for specific gravity; that the tests were made under prevailing temperature conditions and, by the use of correction tables published by the United States Department of Commerce and approved by the American Petroleum Institute, were translated into terms of specific gravity at 60 degrees Fahrenheit, the accepted standard of measurement. The test in- [fol. 18] dicated that the corrected gravity of the commodity varied between 48 and 54 degrees A. P. I. The National Standard Petroleum Oil Tables, published under date of May 29, 1924, by the United States Bureau of Standards and approved by the American Petroleum Institute, and the Bureau of Mines, were introduced in evidence to show that the weight in pounds per gallon of crude petroleum distillate, varying in specific gravity as above noted, ranged from 6.563 pounds at 48 degrees A. P. I. to 6.350 pounds at 54 degrees A. P. I. It is clear, therefore, from the tests made by complainant and defendant that the actual weight of a gallon of the commodity in question does not exceed 6.6 pounds.

Crude petroleum distillate, as such, is not found in Western, Official, or Southern classifications, which severally assign to crude oil, fuel oil, and gas oil an estimated weight of 7.4 pounds to the gallon. The reasons that prompted the defendant herein to provide that the charges on crude petroleum distillate should be computed on an estimated weight of 7.4 pounds per gallon on the shell capacity of the

tank are not clear. It is evident, however, that no tests were conducted to determine the average actual weight of the commodity and that the carrier assumed that the crude petroleum estimated weight was the proper weight to use for the movement of crude petroleum distillate. It is noted that it still carries the estimated weight of 7.4 pounds per gallon in its interstate tariff (G. N. G. F. O. No. 2268-E, I. C. C. No. A-6565).

While not attempting to defend the estimated weight of 7.4 pounds as being reasonably related to the average actual weight of a gallon of crude petroleum distillate, the defendant asserts that because the tariff naming the 20½-cent rate on this commodity also carried the rule that such [fol. 19] rate was subject to the estimated weight of 7.4 pounds per gallon, this proceeding must be viewed as a complaint against alleged unreasonable freight charges resulting from the combination of the estimated weight and the tariff rate, and that the burden of proving the unreasonableness of the transportation charges assessed and collected rests upon complainant.

In support of its position defendant cites Increased Weights on Kale, Lettuce and Spinach, 61 I. C. C. 586, a proceeding wherein the American Railway Express Company propose to increase, on shipments by express, the estimated weights on spinach and kale shipped in baskets and hampers, and on spinach in barrels. It was shown that the average actual weight of a bushel basket of spinach was 33 pounds, whereas, the estimated weight provided in the tariff was 20 pounds. In refusing permission to the carrier to increase estimated weight on spinach from 20 to 25 pounds, the Commission said:

"Estimated weights are commonly used for the convenience of both the shippers and the carrier, and they should preferably bear some close relation to the actual weights. While the weights proposed are more clearly in harmony with the actual weights than those now maintained, the latter have been in effect since the inception of the industry and the rates have been made with relation thereto. In a case of this kind where the practical and only effect of the proposed increase in estimated weights would be a substantial increase in transportation charges, the respondents should show not only that the proposed estimated weights

are not excessive, but also that the application of the existing rates to such estimated weights will not result in unreasonable transportation charges to the shipper. This has not been done. We accordingly find that the proposed increases have not been justified, and an order will be entered requiring the cancellation of the suspended schedules."

Defendant also cites along the same lines Estimated Weight on Petroleum Crude Oil from Texas, 64 I. C. C. 545, Weights on Berries in Pony Refrigerators, 64 I. C. C. 610, [fol. 20] and Actual Weights on Crude and Fuel Oil, 69 I. C. C. 194. The first mentioned case (an Investigation and Suspension Docket proceeding wherein the respondents did not appear to justify the proposed increases), involved a proposed increase of the estimated weight of petroleum crude oil, in tank-car loads, from Texas to interstate points, from 6.6 to 7.4 pounds per gallon. The Commission noted that the establishment of the 6.6-pound basis was the result of investigations conducted by the carriers and representatives of the petroleum industry some ten years before and had been in effect for a number of years, in so far as traffic east of the Mississippi River was concerned, on all lines from the midcontinent field except the Baltimore & Ohio, which published the 7.4-pound basis. Further, that the proposed change would apply over all lines from Texas producing points but would not change the 6.6-pound basis from producing points in Kansas and Oklahoma. It also found that the proposed change of estimated weight would result in an increase of approximately 12 per cent in the freight charges on crude petroleum from Texas points to destinations east of the Mississippi River. The proposed change was rejected. In the second case cited, the Commission, on the authority of Increased Weights on Kale, etc., supra, refused authority to increase the estimated weights on berries, shipped by express, from points in Florida to destinations throughout the United States, the Commission observing:

"*While the proposed weights are more nearly in harmony with the actual weights than the present estimated weights, we must consider that the rates have been made in relation thereto.*" (Emphasis supplied.)

In the third case cited supra, the carriers proposed to substitute actual weight per gallon in lieu of estimated weight of 7.4 pounds per gallon for the ascertainment of [fol. 21] freight charges on petroleum crude and fuel oil in tank-car loads, from Kansas, Oklahoma and Texas fields to certain destinations in Arizona and New Mexico and to Cannanea, New Mexico. The proposed change, the Commission found, was aimed primarily at Mexican Oil, which was being received at Texas ports and destined largely for the copper mining regions of Arizona and New Mexico. It appears that 7.4 pounds per gallon fairly approximated the average weight of crude oil and fuel oil in this territory. Having found that the estimated weight of 7.4 pounds was not unreasonably low as an average, and not unduly prejudicial to other producers, the carriers' proposal was rejected.

Defendant has not, however, cited any cases before the Interstate Commerce Commission or other tribunal involving a claim of a shipper against a carrier for reparations arising out of the use of estimated weights in excess of actual or average actual weights wherein it has been held that the burden rested upon the shipper not only to establish that the estimated weight was unreasonable in relation to actual or average actual weight but to also prove that the resultant freight charge in and of itself was unreasonable, nor has an examination of precedents revealed any such authority to us. On the other hand, there are numerous cases sustaining the right of a shipper to reparations upon proof only of the unreasonableness of an estimated weight in relation to actual or average actual weight. In Standard Paint Co. vs. Southern Pacific Co., et al., 37 I. C. C. 405, it appeared that the complainant had shipped a number of carloads of liquid asphaltum in tank cars from California to Illinois and paid freight thereon at the lawful rate and estimated weight of 8.6 pounds per gallon applied to the marked gallon capacity of the cars. The proceeding before the Commission was for a reparatory award for the difference between the charges that would have accrued at the [fol. 22] lawful rate applied on the basis of actual weight of the shipments, and the charges actually paid. The rate charged was not assailed. The Commission found that

the transportation charges attacked were unreasonable to the extent that they exceeded the charges that would have accrued at the lawfully published rate based upon an estimated weight of 7.9 pounds per gallon. In National League of Commission Merchants of the United States, et al. vs. Atlantic Coast Line Railroad Co., et al. 39 I. C. C. 563, the complaint alleged that charges collected by defendants for the transportation of a number of carloads of cabbages in crates, shipped from Florida to New York, were unreasonable and excessive in that they were based on an estimated weight of 120 pounds per standard crate, instead of on the basis of actual weight. Complainants did not attack the rate charged nor did they seriously contest the use of estimated weights. The Commission held that the complainants and other shippers similarly situated were entitled to ship cabbages on estimated weights fairly adjusted to the actual weights of their shipments and entered a finding that complainants were damaged to the extent that the charges paid exceeded the charge that would have accrued on the basis of an estmated weight of 115 pounds per standard crate, therein found reasonable. In Frank Simpson Fruit Co. vs. Wells Fargo & Co., 23 I. C. C. 412, a tariff provision estimating the weight of a case of 30 dozen eggs to be 55 pounds was found unreasonable to the extent that it exceeded an estimated weight of 53 pounds and an award of reparation was made. It affirmatively appeared that the tariff rate of $3.00 per one hundred pounds was not under attack. In Henderson Lumber Co. vs. Baltimore & Ohio Railroad Co. et al., 60 I. C. C. 159, the complainant attacked [fol. 23] the use of an estimated weight of 45 pounds per post as applied to a carload shipment of standard 6-foot pit posts moving from West Virginia to Pennsylvania. The rates were not an issue. The estimated weight was found reasonable and reparations denied (see also Sun Co. vs. Indianapolis Southern Railroad Co., et al. 22 I. C. C. 194, and Lemet Salvey Co. vs. Director General, 83 I. C. C. 492).

The only rule fairly deducible from the authorities that has the sanction of logic is that in this character of proceeding where the shipper alleges that he has been subjected to unreasonable transportation charges by reason of the use of estimated weights unreasonably in excess of actual or average weights, it is incumbent upon the shipper to prove that the estimated weight is unreasonable in rela-

tion to the actual or average actual weight, which proof gives rise to the presumption that the carrier having employed an unreasonable and excessive factor in the computation of transportation charges the resultant freight charges were and are unreasonable; in other words, establishes a prima facie case which, in the absence of countervailing evidence, is entitled to prevail. If it be a fact that the level of the rate upon which the shipments moved was influenced in its establishment by the carrier by the estimated weight of the commodity, that is, was essentially predicated in relation to the estimated weight, then, it is our view, the carrier should prove this fact and justify the resulting transportation charge as just and reasonable. This, the carrier has not proved in this case, contending, as above noted, that the burden rested upon complainant not only to prove the unreasonableness of the tariff provision relating to estimated weights but likewise the unreasonableness of the resulting transportation charge. Fur- [fol. 24] ther, the evidence is fairly conclusive that the rate of 20½ cents on crude petroleum distillate was not essentially predicated upon the estimated weight of 7.4 pounds per gallon. It is not probable that the defendant would have seriously entertained the complaint of the Sunburst Oil & Refining Company for a reduction of estimated weights without suggesting that the rate and estimated weight were so related that a decrease in one would work an increase in the other, if such were the facts. Nor would it have called in the Western Weighin- and Inspection Bureau for verification of the refinery's contention that the estimated weight was excessive, nor would it have reduced, upon report of the inspection bureau, its estimated weight from 7.4 pounds per gallon to 6.6 pounds per gallon not only between the points involved in the refinery's complaint but between all points on its system in Montana where commodity rates had been published on crude petroleum distillate, without making some adjustments in the level of rates, if it were true that these rates were predicted specifically upon the assumption that this commodity would move only under an estimated weight of 7.4 pounds. All of the circumstances persuasively argue that the rates were fixed primarily with the idea of stating a just and reasonable rate for the movement of one hundred pounds of crude petroleum distillate and not for the movement of a lesser

amount. The effort to clothe the reduction of estimated weight in the garb of a voluntary reduction of a rate and therefore subject to the rule that a voluntary reduction of a rate by a carrier does not prove the prior rate to be unreasonable or otherwise unlawful, is not sustainable by the record. In the first place, the action of the carrier in the premises was voluntary only in a limited sense as it [fol. 25] only reduced the estimated weight after complaint made to it by an interested shipper and investigation undertaken by an independent agency resulting in a report upholding the shipper's contention. Secondly, the correction of a manifestly erroneous basis of computing transportation charges can with little logic be designated a rate reduction.

Nothing herein said is to be construed as a condemnation of the use of estimated weights. Their use, where for practical reasons it is not possible or inconvenient to ascertain actual weights, is a practice quite generally approved by regulatory bodies and where it appears that the estimate is fairly representative of the actual weight, it is of benefit to both shipper and carrier. They tend to expedite the service and minimize the labor and expense of carriage. It is obvious, however, that if an estimated weight is less than the actual weight, the shipper obtains free transportation of so much of his shipment as in excess of the estimated weight, and that if the estimated weight is greater than the actual weight, the carrier obtains a revenue upon the excess not hauled. It is important, therefore, in our opinion, that estimated weights be fairly adjusted to actual weights.

The argument made by the defendant that the Board, having approved the tariff establishing the 20½-cent rate with the provisions therein prescribing that the rate was subpect to an estimated weight at 7.4 pounds per gallon, the obligation rested upon the defendant, under the Montana statutes, to not deviate from the tariff and that having complied therewith it is exculpated from any liability, is specious. Approval by the Board of a rate, rule or regulation, establishes the prima facie reasonableness thereof but such a rate, rule or regulation is open to attack before the Board at the instance of a shipper or interested party as to just- [fol. 26] ness and reasonableness, and if the assailant establishes that an order of the Board fixing a rate, charge,

toll, regulation or classification is unjust and unreasonable, the Board has not only the power but it is its duty to set the offending order aside and to prescribe in lieu thereof an order comporting with the standards of reasonableness and justness (3796 R. C. M. 1921).

Upon the record we find that the rule of the defendants, above referred to, estimating the weight of a gallon of crude petroleum distillate at 7.4 pounds per gallon was and is unjust and unreasonable to the extent that it exceeded or exceeds 6.6 pounds per gallon; that the shipments involved were made to the complainant as in the complaint alleged; that the complainant paid and bore the charges thereon on the basis of an estimated weight of 7.4 pounds per gallon and that the charges assailed were unreasonable to the extent that they exceeded the charges that would have accrued at the lawfully published rate based upon an estimated weight of 6.6 pounds per gallon and the marked gallon capacity of the cars used. To the extent that the complainant seeks an order requiring the defendant to refund the difference between the charges paid and the charges that would have accrued at the lawfully published rate based upon an estimated weight of 6.6 pounds per gallon, herein found reasonable, it must be denied as this Board is without authority to make an award of reparation (Deney vs. Northern Pacific Ry. Co., 60 Mont. 209). Complainant's remedy, beyond this point, exists only in the courts (idem).

An appropriate order will be entered.

[fol. 27]

Order

At a session of the Board of Railroad Commissioners of the State of Montana held in its office in the Capitol, Helena, Montana, Monday, October 14, 1929, present Chairman Dennis and Commissioners Boyle and Young, there regularly came before the Board for final action the matters and things involved in Docket No. 1033, and it appearing that the Board has this day issued its report herein, which report is hereby referred to and of this order made a part, and that all matters and things involved have been duly investigated and a public hearing had whereat all persons interested had opportunity to appear and present their respective interests, and now the Board being fully advised in the premises.

It is, therefore, ordered that the complaint of the Sunburst Oil & Refining Company against the Great Northern Railway Company, defendant, shall be, and the same is hereby sustained, except to the extent that the said complaint prays for an order of reparation.

It is further ordered, declared, and found that the rule promulgated by the defendant Great Northern Railway Company in its local tariff on petroleum crude oil and crude petroleum distillate in tank cars, carloads, issued January 26, 1926, effective January 30, 1926, (G. N. Ry. G. F. O. No. 2073-F), providing that the rates on crude petroleum distillate, as described therein, are subject to estimated weight of 7.4 pounds per gallon, was and is unjust and unreasonable to the extent that the said prescribed estimated weight exceeded or exceeds an estimated weight of 6.6 pounds per gallon; that the complainant made the shipments described in the complaint herein and between the dates therein named; that the complainant paid and bore the charges [fol. 28] thereon on the basis of the estimated weight of 7.4 pounds per gallon, prescribed as aforesaid, and that the charges paid and bor-e as aforesaid were and are unreasonable to the extent that they exceeded or exceed the charges that would have accrued at the rate of 20½ cents per one hundred pounds based upon an estimated weight of 6.6 pounds per gallon and the marked gallon capacity of the cars used.

It is further ordered that the Secretary shall serve a true copy of this report and order upon each of the parties hereto and that the same shall be in full force and effect forthwith according to its terms.

Lee Dennis, Chairman; Daniel Boyle, Commissioner; Leonard C. Young, Commissioner, Being and Constituting the Board of Railroad Commissioners of the State of Montana.

Attest: Official.

Francis A. Silver, Secretary. (Seal.)

[File endorsement omitted.]

In District Court of Cascade County

Additional Stipulation of Facts—Filed Oct. 17, 1930

It is hereby stipulated between the parties hereto, through their respective counsel, that paragraph VII of the agreed statement of facts herein shall be amended by the addition thereto of the following words at the end of said paragraph:

[fol. 29] "Which payment was made by plaintiff to defendant in Cascade County, Montana,"

and that said amendment shall be considered by the Court as a part and portion of the facts herein agreed upon and stipulated.

Dated this 8th day of October, 1930.

Hurd, Hall & McCabe, Attorneys for Plaintiff. W. L. Clift, R. J. Hagman, J. P. Plunkett, Attorneys for Defendant.

[File endorsement omitted.]

In District Court of Cascade County

Judgment—Filed Oct. 17, 1930

This cause having been submitted to the Court herein upon the pleadings and an agreed statement of facts stipulated to by the parties herein, and upon briefs submitted by the respective parties, and the Court having considered said pleadings and said agreed statement of facts, and the briefs of counsel, and being in all things duly advised in the premises, ordered judgment in favor of said plaintiff and against said defendant.

Wherefore, by reason of the premises and upon motion of counsel for the palintiff,

[fol. 30] It is hereby ordered, adjudged, and decreed that plaintiff have and recover of and from said defendant the sum of $2,771.30, being the excessive freight paid by plaintiff to defendant between the 2nd day of April, 1927, and the

1st day of April, 1930, the date of the filing of plaintiff's complaint herein, together with interest thereon at the rate of eight per cent per annum from August 15th, 1928, to the date hereof amounting to $482.20, together with plaintiff's costs and disbursements amounting to the sum of $8.75, making a total judgment of $3,262.25, with interest thereon at the rate of eight per cent per annum from the date hereof until paid.

Dated this 17th day of October, 1930.

H. H. Ewing, Judge.

[File endorsement omitted.]

IN DISTRICT COURT OF CASCADE COUNTY

NOTICE OF APPEAL FROM JUDGMENT

To Sunburst Oil and Refining Company, a corporation, plaintiff in the above-entitled action, and to Messrs. Hurd, Hall & McCabe, its attorneys:

You, and each of you will please take notice that the defendant in the above entitled cause hereby appeals to the Supreme Court of the State of Montana from the judgment rendered and entered in said cause by the above entitled Court on the 17th day of October, 1930, in favor of the plaintiff and against the defendant, for the principal sum [fol. 31] of $2,771.30, together with interest thereon at the rate of 8% per annum from August 15, 1928, to the 17th day of October, 1930, amounting to the sum of $482.20, and costs amounting to the sum of $8.75, making the total amount of said judgment $3,262.25; which judgment is the final and only judgment rendered, entered and docketed in said cause.

Said defendant appeals from said judgment and the whole thereof.

Dated this 13th day of December, 1930.

R. J. Hagmam, J. P. Plunkett, Attorneys for Defendent, Saint Paul, Minnesota. W. L. Clift, Attorney for Defendant, Great Falls, Montana.

[fol. 32] Clerk's certificate to foregoing transcript omitted in printing.

Due and personal service of the foregoing Transcript on Appeal by receipt of a copy thereof is hereby admitted this 11th day of February, 1931.

Hurd, Hall & McCabe, Attorneys for Respondent.

[fol. 33] In Supreme Court of Montana, December Term, 1931

No. 6843

Sunburst Oil and Refining Company, a Corporation, Plaintiff and Respondent,

vs.

Great Northern Railway Company, a Corporation, Defendant and Appellant.

Submitted November 7, 1931. Decided January 4, 1932.

[File endorsement omitted.]

[fol. 34] Opinion—Filed Jan. 4, 1932

Mr. Justice Galen delivered the Opinion of the Court.

This is an appeal from a judgment of the district court of Cascade County, entered October 17, 1930, awarding the plaintiff $3,262.25, together with interest and costs, by reason of alleged unjust and unreasonable freight charges collected by the defendant from the plaintiff for the transportation of 266 cars of petroleum distillate on the defendant's railroad from Kevin and Sunburst to Great Falls, between August 28, 1926, and August 4, 1928. The rate charged was in accordance with the published tariff of the board of railroad commissioners then in effect, prescribing a rate of 20½ cents per hundred pounds on crude petroleum distillate from Kevin and Sunburst to Great Falls, subject to an estimated weight of 7.4 pounds per gallon.

On April 19, 1929, the plaintiff filed a complaint with the board of railroad commissioners, in which it is alleged that the correct weight on crude petroleum distillate is 6.653 pounds per gallon, and that as a result of the defendant having computed its charges on the basis of an estimated weight of 7.4 pounds per gallon, the plaintiff was required to pay unjust and unreasonable charges on such shipments. The board found the rates charged to be unjust and unreasonable to the extent that the prescribed estimated weight exceeds or exceeded an estimated weight of 6.6 pounds per gallon. This action was instituted to recover the amount of alleged over payments. On appeal to this court the cause was consolidated with No. 6845, Montana Horse Products Company v. Great Northern Railway [fol. 35] Company, and the two were argued and presented together, it being conceded that each involved the primary question of whether under the laws of this state the board of railroad commissioners has power and authority to make a retroactive order finding that the rates charged and collected on the shipment of petroleum distillate from Kevin and Sunburst to Great Falls of 20½ cents per hundred pounds on an estimated weight per gallon of 7.4 pounds (which rate had been approved by the board and was in effect at the time the shipments were made), were unjust and unreasonable, thus permitting the plaintiff to recover the amount charged and collected on the basis of such tariff and the amount found by the commission to be a reasonable rate based upon the actual weight of crude petroleum distillate.

We have made careful examination of the authorities and are of opinion that our decision this day rendered in the case of Montana Horse Products Co. v. Great Northern Railway Co. is controlling.

In computing freight tariffs, both rate and weight are factors in the equation, and it is common practice with respect to commodities like petroleum to fix an estimated weight which shall govern in computation of the tariff rather than the actual weight (12 I. C. C. 306). In the case of Northern Pacific Ry. Co. v. Department of Public Works, 136 Wash. 389, 240 Pac. 362, wherein it appears that the commission fixed rates on intrastate shipments of certain wood on a basis of 128 cubic feet per cord, and later, in a supplementary order established 192 cubic feet

per cord, as the estimate on which to base the tariff; it was by the court held that the second order was prospective and not retroactive, and that a shipper who shipped such wood during the period the first tariff was in effect on [fol. 36] estimated measurement could not recover reparation of the difference between what he was charged on a 128 cubic foot basis and what the charge would have been on a 192 cubic foot basis, inasmuch as at the time of shipment, rates on the basis of 128 cubic feet were standard and lawful. In the case of Actual Weights on Crude and Fuel Oil, 69 I. C. C. Reports, 194, it is said: "The practice of shipping petroleum oils under estimated weights has long been in effect." In that case the interstate commerce commission ordered the carriers serving the oil fields in Kansas, Oklahoma and Texas to cancel a tariff by which they proposed to substitute actual weights on crude and fuel oil for the estimated weights previously existing as a part of their published tariffs. And in the case of White & Co. v. B. & O. S. W. R. R., 12 I. C. C. 306, it is said:

"The commission has recognized the right of carriers, in order to facilitate the movement of the business, to fix an estimated weight upon certain standard packages upon which a rate is based. The estimated weight is taken into consideration in the making of the rate itself, and of such estimated weights shippers have no right to complain before this commission and secure relief."

The practice of estimating weights is not improper if fairly carried out. (Drinker on The Interstate Commerce Act, Vol. 1, p. 264; Barrow v. Yazoo & M. V. R. Co., 10 I. C. C. 333.)

In the case of Semet-Solvay Co. v. Director General, 83 I. C. C. 492, involving the oil of coal tar shipments, the actual weight of which was found to be 7.38 pounds per gallon, it is said:

"The record leaves no doubt that the shipments consisted of light oil of coal tar from the destructive distillation of coal, which during the period of movement was included in the classification under coal-tar oil, crude, not otherwise indexed by name, and in the commodity tariffs [fol. 37] as coal-tar oil. Since the provision in the commodity tariffs was not amended during the period of move-

ment, the charges on complainant's shipments were correctly assessed on the basis of an estimated weight of 8.5 pounds per gallon."

In the case of Henderson Lumber Co. v. B. & O. Railroad Co., 60 I. C. C. 159, involving the shipment of posts on an estimated weight prescribed in the published tariffs it is said:

"The application of estimated weights, where for practical reasons it is inconvenient or impossible to ascertain actual weights, benefits both shipper and carrier, and is not to be condemned except where it appears that the estimate is not fairly representative of the actual weights." (See also, Sun Co. v. I. S. R. R. Co., 22 I. C. C. 194, and Simpson Fruit Co. v. Wells Fargo & Co., 23 I. C. C. 412.)

Since the finding by the commission as to the unreasonableness of the rate because of the difference between the actual and the estimated weight of the oil operated prospectively only; and the only lawful tariff which could be exacted by the carrier was that which was at the time prescribed in its published tariff as fixed by the commission, it is apparent that the plaintiff is not entitled to damages by way of reparation. Common law rights of the shipper are superseded by the statute.

Under our statutes, so long as the rates established by the commission are in force, they are presumed to be reasonable, and neither the commission nor the courts have power to retroactively declare such established rates unreasonable, and thus permit the recovery of damages to the extent of the overplus paid by a shipper or an undercharge collected by the carrier. (Montana Horse Products Company v. Great Northern Railway Company, supra.) However, because of our misinterpretation of the statutes [fol. 38] in the case of Doney v. Northern Pacific Railway Co., 60 Mont. 209, 199 Pac. 432, pointed out in the Montana Horse Products Company decision, we are constrained to hold, as we did in the last mentioned case, and for the same reasons, that the Doney case measured the rights of the plaintiff herein and prescribed its remedy, notwithstanding our present views fully set forth in the Montana Horse Products Company case.

For the reasons stated, the judgment will stand affirmed. Affirmed.

Albert J. Galen, Associate Justice.

We concur:

Lew. L. Callaway, Chief Justice. Albert H. Angstman, John A. Matthews, Associate Justices.

Mr. Justice FORD:

I concur in the conclusion reached.

S. C. Ford, Associate Justice.

[fol. 39] On Petition for Rehearing

Mr. Justice GALEN delivered the Opinion of the Court.

For the reasons stated in our opinion rendered in the companion case of Montana Horse Products Company v. Great Northern Railway Company, on petition for a rehearing, this day decided, a rehearing is denied.

Albert J. Galen, Associate Justice.

We concur:

Lew L. Callaway, Chief Justice. Albert H. Angstman, John A. Matthews, Associate Justices.

Mr. Justice FORD:

I concur in the result reached.

S. C. Ford, Associate Justice.

[fol. 40] IN SUPREME COURT OF MONTANA

ORDER DENYING PETITION FOR REHEARING

GALEN, J:

For the reasons stated in our opinion rendered in the companion case of Montana Horse Products Co. v. Great Northern Railway Co., 7 F. (2d) 919, on petition for a rehearing, this day decided, a rehearing is denied.

Callaway, C. J., and Angstman and Matthews, JJ., concur.

FORD, J.:

I concur in the result reached.

[fol. 41] IN SUPREME COURT OF MONTANA

PETITION FOR REHEARING—Filed Jan. 14, 1932

Comes now the appellant in the above entitled action and by its attorneys petitions the Honorable Court for a rehearing therein upon the following grounds:

I

The constitutional questions raised by the appellant, which would be decisive of the case, were overlooked by the court.

II

The decision herein is in conflict with the decision of the Supreme Court of the United States in Arizona Grocery Company v. The Atchison, Topeka & Santa Fe Railway Company, et al., decided January 4, 1932.

Argument

Constitutional Questions

In appealing this case appellant assigned three errors on the part of the court below:

1st. That the court erred in entering judgment in favor of the respondent and against the appellant, in this that under the statutes and laws of Montana the Board of Railroad Commissioners had no power to make a retroactive finding that the rate applied and the charges collected on respondent's shipments were unjust and unreasonable.

2nd. That the court erred in entering judgment in favor of respondent and against the appellant, in this that Chapter 257 of the Revised Codes of Montana 1921, as enforced by the judgment entered by the court below, deprives the appellant of its property without due process of law in violation of Article 3, Section 27, of the Constitution of Montana, and of the Fourteenth Amendment to the Constitution of the United States.

3rd. That the court erred in entering judgment in favor of the respondent and against the appellant, in this that Chapter 257 of the Revised Codes of Montana 1921, as en-

forced by the judgment entered in the lower court, impairs the obligation of the contracts between the respondent and [fol. 42] appellant relating to the transportation of respondent's shipments in violation of Article 3, Section 11, of the Constitution of Montana, and of Article 1, Section 10, of the Constitution of the United States.

The Supreme Court held that the lower court had erred in interpreting the statutes and laws of Montana in such a way as to give to the Board of Railroad Commissioners the power to make a retroactive finding that the rates applied and the charges collected on respondent's shipments were unjust and unreasonable. The Supreme Court said that the Board of Railroad Commissioners had no such power; that its power was limited to changing rates for the future, and that so long as the rates established by the Commission are in force they are presumed to be reasonable and neither the Commission nor the courts have power to retroactively declare such established rates unreasonable and thus permit the recovery of damages to the extent of the overplus paid by the shipper or the undercharge collected by the carrier. We believe that this conclusion is sound and in harmony with the conclusions of other courts on the same point.

However, the court decided that the shipper had been led by surplus language used in the Doney case to believe that he might recover damages from a carrier by obtaining a finding from the Commission that the rates applied and that the charges collected on shipments made in the past were unreasonable and for that reason the doctrine of stare decisis should be applied, and the judgment of the lower court was consequently affirmed, although it is expressly declared that for the future it will be the holding of the court that the Commission does not possess the power which it attempted to exercise.

It was probably due to the conclusion which the court arrived at on the first error assigned that it did not discuss the constitutional questions raised by appellant, but the effect of this decision, at least so far as this case is concerned, was to hold that the Commission had the power to make a retroactive finding of unreasonableness and that upon such finding the lower court was justified in rendering judgment in favor of the respondent. The interpretation of the Montana statutes, which the court announces

will be followed in the future, is undoubtedly correct, but if there was any force to appellant's contention that the judgment of the lower court deprived appellant of its property without due process of law or impaired the obligation of its contracts with respondent, appellant has by this decision been denied its constitutional rights and it re-
[fol. 43] spectfully requests the court to reconsider its decision and to give careful consideration to that part of appellant's brief dealing with these constitutional questions, which will be found on pages 30 to 43 thereof.

On the very day that this court was rendering its decision herein the Supreme Court of the United States handed down a decision in Arizona Grocery Company v. The Atchison, Topeka, & Santa Fe Railway Company, et al. In that case the Interstate Commerce Commission had found on June 22, 1921, that the rate on sugar from various points in California to Phoenix, Arizona, would for the future be unreasonable to the extent that it exceeded 96½ cents. Sometime in 1927 the Commission entered an order in which it found that from and after July 1, 1922, the rates on sugar to Phoenix had been unreasonable to the extent that they had exceeded 73 cents from northern California and 71 cents from southern California, and awarded reparation on that basis. The carriers resisted the reparation award, contending that the Commission had no power to award reparation inasmuch as the rates charged on the shipments in question were no higher than the rates which were fixed by the order of the Commission that was in effect at the time, and that the Commission had no power to make a retroactive order changing rates which it had previously prescribed. The Supreme Court of the United States held that when the Commission in 1921 prescribed a rate of 96½ cents for the future, it was acting in a legislative capacity and when, in 1927, it was sitting to award reparation, it was acting in its judicial capacity and while so acting it was bound to recognize the validity of the rule of conduct prescribed by it and not to repeal its own enactment with retroactive effect. The court said:

"It could repeal the order as it affected future action, and substitute a new rule of conduct as often as occasion might require, but this was obviously the limit of its power, as of that of the legislature itself."

In other words, the court says that neither the legislature nor its creature, the Commission, had the power to declare retroactively that something was unlawful which it had previously declared to be lawful. If this applies to the Interstate Commerce Commission, which merely prescribes maximum rates, leaving the carriers free to publish any rates that do not exceed the maxima prescribed, it should apply a fortiori to the situation here where the appellant was forbidden by law to charge either more or less than the rate fixed by the Commission. For the legislature or the Commission to declare retroactively that a rate was [fol. 44] unlawful which had previously been fixed by the legislature or the Commission as the only lawful rate that could be applied, would deprive the carrier of its vested rights in violation of the due process clause of the Federal and State Constitutions and also in violation of the provisions in those constitutions with reference to the impairment of the obligations of contracts. The decision of the Supreme Court of the United States is decisive of this case in so far as the violations of the Federal Constitution are concerned, and we respectfully urge the court to give the decision referred to careful consideration.

In affirming the judgment of the lower court this court has invoked the rule of stare decisis. Respecting that rule Corpus Juris says:

"It is a well established general rule that where a principle of law has become settled by a series of decisions, it is binding on the courts and should be followed. This rule, which is usually known and referred to as the rule of stare decisis, is founded largely upon considerations of expediency and sound principles of public policy, it being indispensable to the due administration of justice, especially by a court of last resort, that a question once deliberately examined and decided should be considered as settled and closed to further argument, and the courts are slow to interfere with the principle announced by the decision and it may be upheld even though they would decide otherwise were the question a new one, although the doctrine will not be applied to the extent of perpetuating error." 15 C. J. 916.

It will be noted that this authority says that where a principle of law has become settled by a series of decisions, it is binding on the courts and should be followed. The question of whether or not the Commission had the power to make a retroactive finding with respect to a rate made by it, was not settled by a series of decisions but was stated by the court in the Doney case in a proceeding in which that question had not been raised; in which it was not necessary to decide that question; and in which the court now says in this decision that the language used was not necessary and had no proper place in the opinion. Furthermore, the application of the doctrine of stare decisis to this case would have the effect of perpetuating an error which the court admits was made. It would seem to appellant that under the circumstances the doctrine of stare decisis has no application to this case.

The court says that notwithstanding the fact that the language referred to in the Doney case was not in harmony with the primary holding in the decision; was not necessary to the decision of the case; and had no proper place in [fol. 45] the opinion, nevertheless it was not obiter dictum and the shipper had a right to rely upon this language and that it furnished a just basis for shipper's claim. This is not in harmony with previous decisions of this court in which it has been held that if general expressions go beyond the needs of a particular case they may be respected but ought not to control the judgment in a subsequent suit. For example, in Martien v. Porter, 68 Mont. 450; 219 Pac. 817, the court said:

"In the course of the opinion it was held that the attempted amendment had not become a part of the Constitution because of the defects above pointed out. The question of substantial compliance with the provisions of the Constitution was not considered in the case at all. In fact, under the conditions disclosed by the record, it could not have been properly suggested; but in the course of the opinion Mr. Justice Hunt, speaking of the provisions of the Constitution generally, said:

" 'There is no discretion in that body (the Legislature) to ignore the commands of the fundamental authority, or override its limitations in great or small matters.'

"If by this language the court intended to declare that there must be a literal compliance with every procedural

detail in submitting a proposed amendment to the electors and that rule of construction should still prevail, then the attempted amendment involved in the present case must fall by the wayside. However, in the decision of that case, it was not necessary for the court, in order to reach the conclusion which it did, to go to the extent of declaring so strict a rule of construction as the one which might be deduced from the language used.

"In speaking of the force and effect of prior decisions of the court as precedents, Mr. Chief Justice Marshall, in the case of Cohens v. Virginia, 6 Wheat, 264, 399 (5 L. Ed. 257), used the following language:

" 'It is a maxim, not to be disregarded, that general expressions, in every opinion, are to be taken in connection with the case in which those expressions are used. If they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit, when the very point is presented for decision. The reason of this maxim is obvious. The question actually before the court is investigated with care, and considered in its full extent. Other principles which may serve to illustrate it are considered in their relation to the case decided, but their possible bearing on all other cases is seldom completely investigated.' "

But whether or not the language used was dictum no vested right of the respondent would be violated by a decision in appellant's favor. No one has a vested right to a particular remedy. 12 C. J. 974. Respondent claims the right to have the reasonableness of the Commission's rates determined by the Commission itself in a subsequent proceeding. The statute provides a method of testing the [fol. 46] reasonableness of Commission-made rates, namely, by a direct appeal to the courts for that purpose. Giving all of the effect to the Doney case that respondent claims for it, it was merely a holding that a shipper had two methods of determining the reasonableness of the Commission's rates, one, by an appeal to the courts, and the other, by a subsequent proceeding before the Commission. The Supreme Court now holds that the shipper has but one remedy and that is the appeal to the courts. No vested right of the shipper is destroyed by the later holding and the judgment of the lower court should be reversed.

In its decision the Supreme Court refers to the case of Montana Nat. Bank v. Yellowstone County, 276 U. S. 499. In that case a national bank in Montana sought to recover from Yellowstone County taxes levied and collected by the county under the statutes of Montana which the bank claimed were invalid as being in conflict with the Revised Statutes, Section 5219, with certain provisions of the Constitution of Montana, and with the Fourteenth Amendment to the Constitution of the United States. At the time the taxes in question were collected the Supreme Court of Montana construed the statutes of the state in such a way as to result in discrimination against national banks and in favor of state banks, and the tax in question was levied and collected under that interpretation of the state law. Later, the Supreme Court of Montana held that the taxing officials were empowered to tax the shares of state banks and thus bring about an equality with national banks, but the Supreme Court of the United States held that this later decision did not prevent the national bank from recovering back the taxes which had been unlawfully collected from it under the previous decision.

This is quite a different situation from the instant case. Here the shipper was not deprived of anything. He paid precisely the same freight charge as would have been paid if the Doney decision had not been rendered. The only difference in his situation that has resulted from the decision in the Doney case is that as a result of that decision he thought he had a choice of remedies, whereas, if the Doney decision had not been rendered he would have had no such belief. But this is not a sufficient ground for the denial of appellant's constitutional rights and the assessment of damages against it in the amount of $4,200.00.

A few words may not be out of place here in answer to [fol. 47] some of the remarks contained in the concurring opinion of Mr. Justice Ford. He states that a common carrier is entitled to a reasonable compensation and no more; that this is an absolute and positive limitation beyond which the Railroad Commission cannot go; and that the rights of a shipper at common law are retained, and the only change that has resulted from the enactment of the Railway Commission Act is the provision of different procedure for the enforcement of the shipper's rights.

It is true that a carrier is entitled to reasonable compensation and no more, but the law has prescribed a means of determining what shall be reasonable compensation. It is provided that this shall be determined in the first instance by the Commission and that either the shipper or the carrier has a right to appeal to the court if the rate fixed by the Commission is not thought to be reasonable. That is the machinery provided by law and the rights of both the shipper and the carrier are amply protected thereby. When the Commission has prescribed a rate it is conclusively presumed to be reasonable until a court upon appeal has found otherwise. There is nothing unfair in such a provision and it applies equally to rates that the shipper may think are too high and to those that a carrier may think are too low.

The concurring opinion also makes the point that a rate may be legal and yet be unlawful in that it is unreasonable. This point was made before the Supreme Court of the United States in the Arizona Grocery Company case, supra, and the court disposed of it in the following language:

"Specific rates prescribed for the future take the place of the legal tariff rates theretofore in force by the voluntary action of the carriers and themselves become the legal rate. As to such rates there is therefore no difference between the legal or published tariff rate and the lawful rate. The carrier cannot change a rate so prescribed and take its chances of an adjudication that the substituted rate will be found reasonable. It is bound to conform to the order of the Commission. If that body sets too low a rate the carrier has no redress save a new hearing and the fixing of a more adequate rate for the future. It cannot have reparation from the shippers for a rate collected under the order upon the ground that it was unreasonably low. This is true because the Commission, in naming the rate, speaks in its quasi-legislative capacity. The prescription of a maximum rate, or maximum and minimum rates, is equally legislative in quality as is the fixing of a specified rate."

This applies with even greater force to rates in Montana where the carrier is prohibited under severe penalties from collecting either more or less than the rate fixed by the Commission. It would certainly be an anomalous situation if a carrier could be subjected to heavy penalties if it failed

[fol. 48] to collect a rate which the Commission had fixed and yet could be subjected to heavy damages in a civil action if it collected such rate. In order that a carrier may be liable in damages for collecting an unreasonable rate it must have some choice as to the rate that it shall collect. Where it has no choice and must collect the rate fixed by law, it cannot be liable in damages for collecting that rate.

Respectfully submitted.

W. L. Clift, Great Falls, Montana; R. J. Hagman, J. P. Plunkett, 1120 Great Northern Bldg., St. Paul, Minnesota, Attorneys for Appellant.

January 2, 1932.

[File endorsement omitted.]

Personal service of the within pet-ion and receipt of copy thereof is hereby acknowledged this 14th day of January 1932.

George E. Hurd, Hall & McCabe, Attorneys for Respondent.

[fol. 49] IN SUPREME COURT OF MONTANA

OBJECTIONS TO PETITION FOR REHEARING—Filed Jan. 20, 1932

On petition for rehearing, but two grounds are presented:

1. The constitutional questions raised by the appellant, which would be decisive of the case, were overlooked by the court.

2. The decision is in conflict with the decision of the Supreme Court of the United States in Arizona Grocery Company vs. The Atchison, Topeka and Santa Fe Railway Company, et al., decided January 4, 1932.

That neither of such grounds are available to the appellant on petition for rehearing is obvious from the decision of the court. Upon argument in behalf of the appellant this court found that "neither the commission nor the courts have power to retroactively declare such established rates unreasonable, and thus permit the recovery of dam-

ages to the extent of the overplus paid by a shipper or an undercharge collected by the carrier."

Such was the determination so earnestly contended for by appellant both in written and oral argument. That the conclusion was reached by one method suggested by the appellant and not by another is beside the point, and clearly no ground for rehearing. The constitutional argument made by appellant was and is directed at the power of the Railroad Commission to declare a rate retroactively unreasonable. If, as the Court has determined, our statutes confer no such rights, no constitutional question arises and no occasion is presented for deciding an academic question. In fact any discussion by this Court of the Constitutional questions presented by appellant could be only hypothetical. In other words after holding, as it did, that the Commission Law granted no power to determine unreasonableness retroactively, this Court, in order to pass upon the Constitutional questions presented, would be compelled to assume for the sake of argument, that the retroactive power was conferred by the statute, and to have then determined that [fol. 50] the statutes theretofore held Constitutional were hypothetically unconstitutional because they conferred a power which as a matter of law they do not confer. To place such a requirement on a Court of last resort would of course lead to absurdities and contradictions never contemplated. The only duty devolving upon this Court is to declare the law upon the facts presented. There is certainly no duty devolving upon it to declare what might hypothetically be the law.

The same is true with the second ground for rehearing presented by appellant. Since this Court followed the reasoning and reached the conclusion announced in the Arizona Grocery case, it cannot be said to have overlooked that decision. That case, in the lower courts, was relied upon by appellant and is cited in this Court's decision. It is sufficient to ask, what more could be done?

It seems obvious from a reading of the argument set forth in appellant's petition for rehearing that appellant's true complaint is not with respect to the failure of this Court to pass upon the Constitutional features, but rather with respect to its application of the rule of Stare decisis. That the rule so announced is properly applied herein is clear. The entire basis for the proceedings initiated by the re-

spondent and culminating in this appeal was the decision of this court in the Doney case. From the briefs and decision in that case it is clear that the proper methods of procedure and the ultimate rights of parties in similar situations were presented to the Court and deliberately passed upon. This brings the case within the rule of Stare Decisis. 15 C. J. 940.

The action of the Court in this case is certainly not without precedent. People vs. Ryan, (Cal.) 92 Pac. 853.

Indeed, as this Court is at pains to point out, the decision in the Doney case was the result of argument and theories advanced by counsel for the railway companies.

Since the decision in the Doney case, both carriers and shippers have relied thereon. More than this, the Railroad Commission, accepting as it must the decision of the Supreme Court as the final and proper contruction of the Act, has followed the decision it its dealings with carrier and shipper. It must further be borne in mind that the carrier after having voluntarily admitted the excessive es- [fol. 51] timated weight participated without objection in the proceeding before the Board, the sole purpose of which was to have the weight declared unreasonable. Its sole objection was that under the decision in the Doney case reparations could not be awarded respondent. In this last respect the Board agreed with counsel for appellant, citing the Doney Case as its authority.

It seems clear, therefore, that no reason exists herein for the granting of appellant's petition for rehearing. All matters now presented were presented in the original briefs and argument. That the matters so presented were most seriously considered is apparent.

Respondent could well rest its objections to the desired rehearing upon the argument above set forth which has so often been reiterated by this Court. However, we desire to point out to the Court additional reasons why the rehearing may not be granted.

Admittedly respondent followed the requirements of the Railroad Commission Law to the fullest extent possible. By proper complaint is forced the Railroad into a quasi-voluntary reduction of the estimated weight. This reduction was an admission by the Railroad Company that the former estimated weight was unreasonable. Oil did not weigh more in 1927 than it did in 1928 or thereafter. Hav-

ing forced the appellant into making this reduction, respondent then, as it supposed it must under the Doney case, presented the matter to the Commission for its determination as to the reasonableness of the previous weight. Upon such decision it filed the present action.

Whatever may be the effect of the decision of the Railroad Commission, it most certainly constitutes a determination, after hearing, as to the actual weight of the commodity. It is further a determination as required by Section 3796 of the reasonableness of the previous weight estimate.

The complaint in this action, as well as the agreed statement of facts, discloses the following undisputed situation:

"That for the transportation of said crude petroleum distillate, defendant required plaintiff to pay the sum of twenty and one-half cents per hundred pounds, that plaintiff had no means of weighing said crude petroleum distillate at the time it delivered same to defendant or otherwise, that defendant was possessed of and had available in course of transportation of said crude petroleum distillate, means for ascertaining the exact weight thereof, but did not do so, [fol. 52] but estimated the weight of said crude petroleum distillate at 7.4 pounds per gallon and required plaintiff to pay for the transportation thereof upon such basis, but the actual weight of said crude petroleum distillate was 6.6 pounds per gallon, that the actual weight of crude petroleum distillate so transported by defendant for plaintiff was not to exceed 17,085,342 pounds, but that defendant estimated the weight thereof at 19,182,237 pounds and required plaintiff to pay for the transportation therof the sum of $39,-310.01.

VIII

That on or about the 15th day of August, 1928, plaintiff demanded of defendant payment to plaintiff of the sum of $4,243.70 representing the difference between the rate calculated upon the actual weight of said crude petroleum distillate and the amount required to be paid by defendant calculated on the estimated weight thereof as aforesaid, but defendant refused and still refuses to pay said sum or any part thereof to plaintiff."

Our Constitution prevents discriminations and unjust charges by carriers.

Article XV, sections 7 and 9, Section 7851 provides:

"A common carrier is entitled to a reasonable compensation and no more, which he may require to be paid in advance."

Under the Constitutional provisions above and our statute respondent has a cause of action against appellant if the compensation exacted is not reasonable.

This cause of action is not lost to respondent by reason of the Railroad Commission Law, but rather the procedure precedent to recovery is merely changed.

R. C. M. 1921, Sec. 3817.

Doney vs. N. P. Ry. Co., 60 Mont. 209.

Unless the provisions of the Railroad Commission Act provide that the rate promulgated by the Commission is conclusive, respondent then has a right of action of some character.

But our Code merely provides that "in any action, hearing or proceeding in any court, the classifications, rates, tolls, charges, regulations, and orders made, fixed and established by said board shall prima facie be deemed to be just, reasonable and proper."

R. C. M. 1921, Secs. 3809, 3810.

There is here, as we have seen, no controversy as to the actual unreasonableness of the estimated weight of 7.4 pounds per gallon. That fact was originally admitted by [fol. 53] the carrier, (R. p. 17); was determined by the commission; is inferentially agreed to in the agreed statement of facts; and, was found by the lower court under the stipulated facts.

It is uncontradicted that appellant collected and respondent paid freight charges upon more than 2,000,000 pounds of distillate than appellant actually carried. Certainly, unless respondent is to be deprived of its property without due process of law, it has some remedy.

Under such facts the cases of Barris vs. Chicago B. & Q. R. Co., (Ia.) 71 N. W. 339, and, California Adj. Co. vs. S. P. Co., 226 Fed., 349, are much in point.

In the Barris case there was no controversy as to the unreasonableness of the rate. In Iowa, as in Montana, the statute required freight rates to be reasonable.

In Iowa, as in Montana, the rate established by the Commission is but prima facie.

The obligation with respect to reasonable rates is obligatory, under our Constitution and statutes, upon the Commission, the carrier and the shipper.

Cal. Adj. Co. vs. S. P. Co., 226 Fed. 349.

Here appellant does not seek to avoid the present judgment upon the theory that the old estimated weight was reasonable. Admitting actual unreasonableness, appellant lays down a smoke barrage of argument upon the questions, academic here, respecting the power of the commission to declare a rate retroactively unreasonable. Much of such argument is based upon constitutional questions which have no bearing upon the situation.

The sole question to be determined here is whether, under our Constitution and Statutes, the Commission may legalize an unreasonable rate and thus abrogate any remedy a shipper or carrier may have.

We may safely admit here that the Commission may not retroactively declare a rate unreasonable. But such an admission counts for nothing under the undisputed facts here presented.

We have here an admission by the Appellant itself that the weight was unreasonable. We have an approval by the Commission of that admission. We have an allegation of unreasonableness in the Court action and a tacit admission thereof by the appellant. We have, by the judgment of the [fol. 54] lower Court, a finding of unreasonableness.

In such a situation our Constitution and section 7851 compel the carrier to return the excessive payment irrespective of the fact that the original weight was sanctioned by the commission.

The powers of the Commission are not unlimited. In court its order was at the most prima facie—presumptively correct. That presumption was met and overturned.

Under such circumstances no reason exists for learned dissertations upon impairment of contract and due process of law.

Rates are subject to legislative control (Const. Art. XV, Sec. 5). The paramount requisites of a rate are that it shall not discriminate and that it shall be reasonable. (Const. Art. XV, Sec. 7, R. C. M. 1921, Sec. 7851.) If it does either, directly or indirectly, it is illegal and invalid, and no pronouncement of the Railroad Commission can make it otherwise. Nor can the Railroad urge impairment of contract or lack of due process when compelled to disgorge its illegal charges.

Not one of the cases cited and relied upon by appellant deals with a situation such as is here presented.

Upon any theory, therefore, the petition for rehearing should be denied.

Respectfully submitted.

George E. Hurd, Hall & McCabe, Attorneys for Respondent.

Service of the within objections and receipt of a copy thereof admitted this 18th day of January 1932.

J. P. Plunkett, R. J. Hagman, W. L. Clift.

[File endorsement omitted.]

[fol. 55] IN SUPREME COURT OF MONTANA

Thirty-seventh Day of December Term, 1931

MINUTE ENTRIES

Friday, February 5, 1932.

Court convened pursuant to recess.

Present:

The Hon. Lew. L. Callaway, Chief Justice.
The Hon. Albert J. Galen, Associate Justice.
The Hon. S. C. Ford, Associate Justice.
The Hon. Albert H. Angstman, Associate Justice.
The Hon. John A. Matthews, Associate Justice.
J. W. Crosby, Clerk.
Russell E. Smith, Marshal.

And the following proceedings were had:

6843

SUNBURST OIL & REFINING COMPANY, a Corporation, Respondent,

v.

GREAT NORTHERN RAILWAY COMPANY, a Corporation, Appellant

It is ordered that the opinion in the above cause, filed January 4, 1932, be amended by striking therefrom, on page 6 of the original as filed, the following:

"Mr. Justice FORD:

I concur in the conclusion reached, but for reasons stated in the specially concurring opinion in Montana Horse Products case, this day decided, I do not su-scribe to all that is said in the above opinion.

S. C. Ford, Associate Justice."

and substituting in place thereof the following:

"Mr. Justice FORD:

I concur in the conclusion reached.

S. C. Ford, Associate Justice."

Appellant's motion for a rehearing is denied. Opinion by Mr. Justice Galen, Mr. Chief Justice Callaway, Mr. Justice Angstman, and Mr. Justice Matthews concurring, Mr. Justice Ford concurring specially.

There being no further matter presented the court went into recess.

Lew. L. Callaway, Chief Justice.

Attest: J. W. Crosby, Clerk.

[fol. 56] IN SUPREME COURT OF MONTANA

[Title omitted]

PETITION FOR ORDER STAYING EXECUTION

To the Honorable Chief Justice of the Supreme Court of the State of Montana or to one of its Honorable Associate Justices:

The petition of Great Northern Railway Company, the appellant in the above entitled cause, respectfully shows:

1. That on or about the 17th day of October, 1930, the District Court of the Eighth Judicial District of the State

of Montana, in and for the County of Cascade, passed, rendered and entered its judgment in favor of plaintiff and against defendant in the above entitled cause, for the sum of Two Thousand Seven Hundred Seventy-one & 30/100 Dollars ($2771.30), together with interest thereon at the rate of eight (8) per cent per annum from August 15, 1928 to the 17th day of October, 1930, amounting to the sum of Four Hundred Eighty-two & 20/100 Dollars ($482.20), and costs amounting to the sum of Eight & 75/100 Dollars ($8.75), making a total judgment of Three Thousand Two Hundred Sixty-two & 25/100 Dollars ($3262.25), which said judgment is the final and only judgment entered in said action.

2. That an appeal was duly perfected by said defendant [fol. 57] to the Supreme Court of the State of Montana, wherein said cause and the judgment rendered therein was duly considered and reviewed, and on the 4th day of January, 1932, said Court duly issued its order affirming said judgment. That thereafter, to-wit, on the 14th day of January, 1932, your Petitioner duly filed in said Court its petition for a rehearing of said cause, and that thereafter, to-wit, on the 5th day of February, 1932, an order was duly given and made by said Court denying said petition for rehearing, and that on the 9th day of February, 1932, remittitur was duly issued by this Court and filed in said District Court on the 11th day of February, 1932, remanding said cause to said District Court for such additional proceedings as might be appropriate therein.

3. That by Act of Congress the time within which petition for Writ of Certiorari may be filed in the Supreme Court of the United States is fixed at three months after the entry of judgment or decree, which has been interpreted by said Court to mean three months after petition for rehearing, if one is filed, has been denied, and it is provided in the rules of said Court that the party making application for said writ shall, as a part of said application, furnish the Court with a certified copy of the whole record, and file with the Clerk of said Court thirty printed copies thereof, and that forty printed copies of the petition for said writ, and the brief in support thereof, shall also be filed with said Clerk, and notice of the filing of the petition, together with a copy of the petition, printed record and supporting brief served on counsel for Respondent within ten days after said filing.

4. That your petitioner conceives that it has been deprived of certain rights under the Constitution of the [fol. 58] United States, and desires that the Supreme Court of the United States pass finally upon such questions, and your petitioner is therefore prepared to perfect the record in this case and will file its petition for said writ on or before the 4th day of May, 1932, and, with this end in view, is engaged in the preparation of said petition, and is proceeding with said application with due diligence; but as said Supreme Court of the United States will adjourn during the last week of May, 1932, for the summer months, said Court may not act on said petition for a Writ of Certiorari prior to adjournment.

That your petitioner is advised that in order that the proceedings may remain in their present status pending the disposition of such petition for said writ, an order of one of the Justices of this Court is required to stay the issuance of an execution to enforce said judgment.

Wherefore your petitioner prays that the Honorable Chief Justice of the above entitled Court or one of its Associate Justices make and enter an order herein staying the issuance of execution on or under said judgment, pending the filing of the aforesaid petition for Writ of Certiorari in the Supreme Court of the United States, and whatever action said Court may take thereon, until the 15th day of June, 1932, or until such further time as may be necessary to prevent the issuance and levy of execution on or under said judgment pending the final decision of the said Supreme Court of the United States in said cause, upon the filing of a good and sufficient Supersedeas Bond or Undertaking in the said District Court in the sum of Seventy-five Hundred Dollars ($7500.00), to be approved by the Justice making said order.

Dated this 24th day of March, 1932.

W. L. Clift, Attorney for Petitioner, Great Falls, [fol. 59] Montana. R. J. Hagman, J. P. Plunkett, Attorneys for Petitioner, St. Paul, Minnesota.

[fol. 60] IN SUPREME COURT OF MONTANA

[Title omitted]

ORDER STAYING EXECUTION—Filed March 24, 1932

Upon the application of the Great Northern Railway Company, defendant and appellant in the above entitled

cause, for an order of one of the Justices of this Court staying the issuance of execution on that certain judgment rendered and entered in the District Court of the Eighth Judicial District of the State of Montana, in and for the County of Cascade, in favor of the plaintiff, and against the defendant therein, on the 17th day of October, 1930, for the sum of Two Thousand Seven Hundred Seventy-one & 30/100 Dollars ($2771.30), together with interest thereon at the rate of eight (8) percent per annum from August 15, 1928 to the 17th day of October, 1930, amounting to the sum of Four Hundred Eighty-two & 20/100 Dollars ($482.20), and costs amounting to the sum of Eight & 75/100 Dollars ($8.75), making a total judgment of Three Thousand Two Hundred Sixty-two & 25/100 Dollars ($3262.25), which said judgment is the final and only judgment rendered in said action; and upon consideration of the foregoing petition, from which it appears that said Railway Company is about to apply to the Supreme Court of the United States for a Writ of Certiorari to review the [fol. 61] judgment and order of this Court affirming said judgment, and upon the motion of W. L. Clift, Esq., one of the attorneys for said Great Northern Railway Company, defendant and appellant in the above entitled cause,

It is hereby ordered that execution in the above entitled cause be stayed to and including the 15th day of June, 1932, or until such later date as may be necessary to prevent the issuance and levy of execution on or under said judgment, pending a final decision of the Supreme Court of the United States on said Railway Company's petition, upon the filing in said District Court of a good and sufficient Supersedeas Bond or Undertaking in the sum of Seventy-five Hundred Dollars ($7500.00) to be approved by the undersigned.

Dated this 24 day of March, 1932.

Llwellyn L. Callaway, Chief Justice.

[File endorsement omitted.]

Service of within papers by receipt of copies thereof is hereby acknowledged this 26th day of March, 1932.

Geo. E. Hurd, Atty. for Plaintiff.

[fol. 62] Clerk's certificate to foregoing transcript omitted in printing.

SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed October 10, 1932

The petition herein for a writ of certiorari to the Supreme Court of the State of Montana is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.